RECORD AND BRIEFS

No. 16-1144

Supreme Court, U.S.
FILED
SEP - 8 2017
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CARLO J. MARINELLO, II,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR NEW YORK COUNCIL OF DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 300 lawyers, including many former federal and state prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. In addition, NYCDL's members (including the authors of this brief) defend many individuals and companies investigated and prosecuted for tax crimes, and thus have extensive first-hand experience with the government's use and abuse of the "Omnibus Clause" of the tax obstruction statute, 26 U.S.C. § 7212(a), particularly in the United States District Courts for the Southern and Eastern Districts of New York.

NYCDL files this *amicus* brief in support of Petitioner Carlo J. Marinello, II urging reversal.[1] NYCDL has a particular interest in this case because

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no party, counsel for a party, or any other person except for *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

NYCDL's core concerns include combatting the unwarranted extension of federal criminal statutes, promoting clear standards for the imposition of criminal liability, and deterring arbitrary enforcement by prosecutors. As shown below, the Second Circuit's overbroad interpretation of the Omnibus Clause raises precisely these concerns, as prosecutions brought in the Southern and Eastern Districts of New York highlight.

SUMMARY OF THE ARGUMENT

As Petitioner forcefully argues, the scope of the Omnibus Clause should be limited to cases in which the defendant deliberately acted to obstruct or impede some pending proceeding before the Internal Revenue Service. This interpretation is consistent with the text of the statute, its legislative history, and this Court's interpretation of other similar obstruction of justice offenses. *See* Petr.Br.23-40; *United States v. Aguilar*, 515 U.S. 593, 598-600 (1995); *United States v. Marinello*, 855 F.3d 455, 456-59 (2d Cir. 2017) (Jacobs, J., dissenting from denial of rehearing *en banc*).

This narrow construction is also necessary to avoid the constitutional problems presented by the Second Circuit's sweeping interpretation that we focus on in this *amicus* brief. This case involves a federal crime that rests on indeterminate language which, if not cabined, would fail to provide fair notice and present substantial opportunities for prosecutorial abuse. Under the Second Circuit's broad reading of the Omnibus Clause, virtually any

conduct that might make the IRS's job harder could be a felony. This would criminalize otherwise innocent activity. It would also encourage other forms of prosecutorial overreaching already common in this context, particularly in the federal courts in which *Amicus*'s members practice. For instance, the lack of any nexus requirement to pending IRS proceedings enables the government to charge a felony where (1) a person's conduct would otherwise at most constitute a mere misdemeanor, as in Marinello's case; (2) there is insufficient proof to support a felony tax offense such as tax evasion or filing a fraudulent return; or (3) criminal charges would otherwise be barred by the statute of limitations. At the same time, there is no compelling policy or law-enforcement reason supporting the Second Circuit's overbroad interpretation, because other felonies already exist to cover serious tax crimes such as evasion and filing false returns, and the Omnibus Clause plainly covers obstruction of actual pending IRS proceedings.

The Second Circuit concluded that Section 7212(a)'s "corruptly" element alleviates any due process concerns, but in practice that element does not provide a meaningful check on prosecutorial overreach. In contrast to the "willfulness" element in other federal tax offenses, the standard instruction on "corruptly" does not require proof of the defendant's knowledge of unlawfulness. Thus, in cases like this one, where a misdemeanor can be proved, "corruptly" adds no additional burden. And in cases involving entirely innocent conduct by defendants with no awareness of any illegality, the "corruptly" element is no bar to a felony charge under the Omnibus Clause.

This Court should adopt a limiting construction to avoid the serious constitutional problems inherent in dispensing with the nexus requirement that should be an element of the Omnibus Clause offense, as it has done in other similar recent cases. *See, e.g., Skilling v. United States*, 561 U.S. 358 (2010); *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

ARGUMENT

I. The Omnibus Clause Of Section 7212(a) Should Be Narrowly Construed To Avoid A Serious Constitutional Problem

As this Court has repeatedly held, it is a violation of the Due Process Clause to "tak[e] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)); *see also, e.g., Skilling*, 561 U.S. at 402-03.

The vagueness doctrine has two complementary purposes. First, it ensures that penal statutes have "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402 (internal quotation marks omitted). Second, the doctrine is intended to avoid a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358

(internal quotation marks omitted); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (same).

As construed by the Second Circuit, the Omnibus Clause implicates both of these constitutional concerns. To avoid ending up on this "vagueness shoal," *Skilling*, 561 U.S. at 368, the provision should be cabined to corrupt endeavors to intentionally obstruct or impede a pending IRS proceeding.

A. The Second Circuit's Interpretation Fails To Provide Fair Notice And Would Criminalize Otherwise Innocent Conduct

By divorcing criminal liability from the requirement of an ongoing proceeding, the Second Circuit's interpretation of the Omnibus Clause lacks fair notice and threatens to criminalize otherwise innocent activity. In particular, it gives the government broad leeway to charge taxpayers who engaged in entirely legal conduct that happens to make the IRS's job harder.

It is easy to envision taxpayers unwittingly violating the Second Circuit's interpretation of Section 7212(a) through entirely lawful conduct. For example, assume a taxpayer filed complete, accurate, and timely returns over the period of many years, but regularly destroyed her business records due to space constraints (*i.e.*, for reasons having nothing to do with a desire to impede the IRS). Were the IRS to

commence an audit, it could readily argue that the taxpayer's document retention practices, which long predated the audit, impaired its ability to conduct the audit, regardless of whether any improper tax reporting was ultimately found. The same would be true in the case of a taxpayer who maintained sloppy books or a complex (but legal) corporate structure. Because the IRS likely will be skeptical that the taxpayer's destruction of records, sloppy recordkeeping, or chosen corporate structure was not intended to conceal unreported income or improper deductions, this innocuous conduct could easily lead to criminal prosecution and its accompanying stigma and economic cost.

The Second Circuit's approach would allow the government to charge such taxpayers under the second prong of Section 7212(a) for entirely legitimate conduct in a scenario where no other tax charge could be brought at all. This would place the burden on the taxpayer to stand trial and rely on a jury to acquit her on a finding that she lacked the requisite *mens rea* to be said to have acted "corruptly." However, as Judge Jacobs correctly pointed out in his dissent from the Second Circuit's denial of rehearing *en banc* below, "[taking] comfort in the mens rea requirement that the act or acts be done 'corruptly' . . . is surely an illusion," as "*alleging* a corrupt motive is no burden at all" to the prosecution, and the mere fact of being charged in a federal criminal proceeding can be destructive to a defendant's life. 855 F.3d at 457. Indeed, as explained *infra* in Point II, in many circuits conduct can be corrupt even if the defendant is unaware that it is unlawful.

Significantly, the government's decision to charge Marinello appears to fall afoul of the Department of Justice Tax Division's own guidance. This guidance recognizes that charges under Section 7212(a) are "particularly appropriate" for conduct that impedes an IRS proceeding. U.S. Dep't of Justice Tax Div., Crim. Tax Manual § 3.00, Tax Division Directive No. 129 (2004), *available at* www.justice.gov/sites/default/files/tax/legacy/2014/08/05/CTM%20Chapter%203.pdf. Absent an ongoing IRS proceeding, charges under Section 7212(a) may be appropriate where individuals have "engaged in large-scale obstructive conduct involving the tax liability of third parties." However, the only example provided of such conduct is "assisting in preparing or filing a large number of fraudulent returns or other tax forms." The directive also indicates that the Omnibus Clause "should not be used as a substitute for a charge directly related to tax liability – such as tax evasion or filing a false tax return – if such a charge is readily provable." *Id.* at 1. In other words, had the Department of Justice followed its own directive, it would not have prosecuted Marinello under the Omnibus Clause. That the government chose to ignore its own guidance only underscores the need for the courts to more clearly demarcate the statute's boundaries.

Nor is *Marinello* the only case that raises the specter of the criminalization of otherwise legal conduct. At least two circuits have stated that Section 7212(a) "is aimed at prohibiting efforts to impede," *inter alia*, "the auditing of one's or another's tax records." *United States v. Kuball*, 976 F.2d 529, 531

(9th Cir. 1992) (quoting *United States v. Reeves*, 752 F.2d 995, 998 (5th Cir. 1985)). Yet "audit avoidance planning," the structuring and reporting of a transaction to minimize the likelihood of audit, is both commonplace and otherwise legal. *See generally* John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 Hous. Bus. & Tax L.J. 255 (2009) (discussing audit avoidance planning and Section 7212(a)). Similarly, other cases suggest that otherwise legal asset transfers may be deemed an effort to impede tax collection. For instance, in *United States v. Shriver*, 967 F.2d 572, 573 (11th Cir. 1992), Section 7212(a) charges were predicated in part on the defendant's transferring title to his property before the IRS filed a tax lien against it. And yet other cases raise the possibility that the government may even use Section 7212(a) to deter conduct protected under the First Amendment. *See, e.g.*, *United States v. Hylton*, 710 F.2d 1106, 1107-08 (5th Cir. 1983) (involving Section 7212(a) charges for filing a trespass complaint against IRS agents who entered defendant's property without permission).[2] Under this sweeping interpretation of the scope of Section 7212(a), a vast swath of conduct that individuals might reasonably view as entirely legitimate risks attracting felony charges.

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[2] Although the Fifth Circuit affirmed the vacatur of defendant's conviction on First Amendment grounds, its decision standing alone does not ensure that other similarly-situated individuals will not be prosecuted in future. *Cf. United States v. Miner*, 774 F.3d 336, 339-42 (6th Cir. 2014) (involving Section 7212(a) charges for, *inter alia*, filing Freedom of Information Act and Privacy Act requests for IRS files).

B. The Second Circuit's Interpretation Invites Prosecutorial Abuse

By enlarging the scope of Section 7212(a), the Second Circuit's approach also invites prosecutorial abuse in the investigative, charging, and plea-negotiation phases of tax cases. In our experience representing clients under investigation for tax-related offenses – or, as is often the case, clients under investigation in the first instance for non-tax-related offenses – we have seen firsthand the unfairness that this approach can cause. The Second Circuit's interpretation of the Omnibus Clause enables prosecutors to charge (or threaten to charge) otherwise innocent activity. It also enables the government to bring (1) felony charges where the taxpayer's conduct would otherwise constitute a mere misdemeanor under 26 U.S.C. § 7203; (2) felony charges where there is insufficient proof to support a felony prosecution under 26 U.S.C. §§ 7201, 7206(1), or 7206(2); or (3) tax charges where all tax-related misconduct would otherwise be barred by the statute of limitations.

1. The Second Circuit's Approach Enables Overcharging of Misdemeanor Conduct as a Felony

As *amicus curiae* American College of Tax Counsel stated in its brief in support of the petition for a writ of certiorari, "[t]he tax enforcement system enacted by Congress and interpreted by the courts creates predictable and comprehensible distinctions between lawful conduct, misdemeanors, and felonies."

ACTC.Cert.Br.6. In implementing Title 26, Congress sought to distinguish between acts of commission, which could be charged as felonies, and failures to act, which were deemed to merit misdemeanor charges. With the exception of two well-defined and limited situations involving taxpayers performing special roles, neither of which applies in this case or the overwhelming majority of Section 7212(a) cases, tax felonies require willful commission of an affirmative act. By contrast, the willful *failure* to act leads only to misdemeanor liability under Section 7203, which criminalizes the failures to file, pay tax due and owing, keep proper records, and provide required information.[3]

The Second Circuit's interpretation of Section 7212(a) eviscerates the lines that Congress has drawn. By enabling omissions – misdemeanor conduct – to be prosecuted as felonies, the Second Circuit's interpretation upends the statutory scheme and violates the proper separation of powers between the legislative and executive branches of government. It creates abundant unpredictability and a lack of fair notice for taxpayers and permits prosecutors (and IRS agents) to claim the "success" of a felony resolution where the defendant's conduct most clearly violated a misdemeanor statute. As Petitioner explains, this

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[3] The only two willful *failures* to act that Congress chose to treat as felonies rather than misdemeanors are the willful failure of a withholding agent to collect, account for, and pay over tax (a felony under 26 U.S.C. § 7202) and the willful failure of a person engaged in a trade or business to comply with currency transaction reporting requirements (a felony under 26 U.S.C. § 7203).

approach enables the government to charge felonies without having "to prove the more demanding elements that Congress required of other key tax felonies," and in so doing fails to read Section 7212(a) in such a way as "to harmonize rather than conflict with, supersede, or be redundant of other provisions." Petr.Br.40-41 (citing *Aguilar*, 515 U.S. at 600; *Achilli v. United States*, 353 U.S. 373, 378-79 (1957)).

Indeed, this case is an unfortunate example of what can happen when prosecutors decide, for whatever reason, that a misdemeanor resolution is insufficient. Although Marinello was investigated for felony tax crimes, there was insufficient evidence to file those charges. Instead he was charged with, and convicted of, eight misdemeanors for his failure to file individual and corporation tax returns. These charges exposed him to eight years in prison, but the sentencing judge deemed concurrent one-year sentences sufficient punishment for these offenses. Adding the Section 7212(a) count not only inflated the taxpayer's misdemeanor misconduct to a felony, with all the associated collateral consequences and incremental stigma, but apparently led the sentencing judge also to *triple* the sentence to a three-year term. Congress plainly did not intend such a result in cases where the taxpayer has taken no affirmative steps to obstruct an audit or other pending proceeding.

A review of cases filed in the United States District Courts for the Southern and Eastern Districts of New York reveals that *Marinello* is not

unique in this regard.[4] For instance, in *United States v. Torim*, 14-cr-238 (S.D.N.Y.), the defendant was charged with five misdemeanor counts of failure to file his individual income tax returns. The indictment also charged a single count of impeding the IRS in violation of Section 7212(a), even though there was no allegation that Torim made any effort to obstruct any pending IRS proceeding. Instead, the 7212(a) charge was based upon Torim's efforts to conceal his income by a variety of means such as shell companies and nominees, as well as his failure to file tax returns. Dkt. No. 2, Indictment, at 3 (Apr. 10, 2014).

As in Petitioner's case, the government was unable to prove any tax felony. It initially contended that the defendant owed $385,000 in unpaid taxes, but by the time of sentencing, had conceded that there was no tax loss. Thus, despite the absence of evidence that he willfully evaded his income tax obligations or otherwise engaged in criminal misconduct beyond failing to file returns, Torim pled guilty to a felony. The precise reason why he agreed to a felony resolution cannot be known with certainty. But it is at least apparent that, in cases like those of Torim and Marinello, the government's ability to use Section 7212(a) to bring a felony charge for misdemeanor

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[4] Nor is this practice limited to the Southern and Eastern Districts of New York. *See, e.g., United States v. Stanton*, 12-cr-343, 2012 WL 5878030, at *1 (M.D. Fla. Nov. 20, 2012) (Section 7212(a) charges based on defendant's failure to file tax returns); *United States v. Armstrong*, 974 F. Supp. 528, 586 n.14 (E.D. Va. 1997) (suggesting that 7212(a) charges are appropriate if individual fails to file tax returns or forms).

conduct is a powerful weapon in the prosecutorial arsenal – but one that is contemplated neither by the language or intent of the Omnibus Clause nor by the guidance offered in the Tax Division's directive.[5]

2. The Second Circuit's Approach Enables the Government to Bring Felony Charges in Cases Where There Is Insufficient Proof that the Defendant Committed Tax Evasion or Willfully Filed False Returns

In cases such as *Marinello* and *Torim*, the Second Circuit's expansive reading of Section 7212(a) also affords the government the ability to charge (or threaten to charge) a felony tax offense notwithstanding evidentiary problems that effectively preclude a prosecution under Sections 7201 or 7206. An individual under criminal investigation should be able to find comfort in the knowledge that the investigation either will or will not turn up sufficient evidence to warrant felony charges, and that she will not be branded a felon if she did not engage in tax evasion, file false returns, or obstruct an ongoing audit or investigation.

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[5] To be sure, in cases where the defendant has engaged in affirmative misconduct that is not a tax crime but that falls under another criminal statute, such as making a false statement to a bank or other (non-IRS) person to hide his income, the government may employ other tools in its arsenal, such as mail, wire, and bank fraud. *See* 18 U.S.C. §§ 1341, 1343, 1344. But in such cases the government should not also be allowed to charge an overbroad tax felony intended only to cover obstruction of the IRS.

An overexpansive reading of Section 7212(a), however, gives the government a toehold that it should not have – a way of charging a defendant with a tax felony despite the absence of proof that he willfully evaded his tax obligations, willfully filed false returns, or engaged in obstructive conduct. This is not an empty possibility: As our experience has shown, it is human nature for prosecutors and IRS agents to want to conclude a lengthy investigation – as many tax investigations are – with a weighty conviction. Additionally, the adversarial nature of the audit and investigative processes can often create significant animosity between even innocent (if sloppy) taxpayers and the investigating agents. This unfortunate but unavoidable dynamic creates further incentives for the agents to advocate for felony charges notwithstanding problems of proof, *de minimis* tax loss, or (as discussed separately below) concerns regarding the applicable statute of limitations.[6]

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[6] Section 7212(a) is also regularly charged in cases where the underlying investigation was conducted by IRS agents working in conjunction with other law enforcement agencies. Based on our experience, if such investigations uncover evidence of significant non-tax related misconduct, the IRS agents may push the prosecutors to include tax charges to enable them to obtain statistical credit for their work. While a charge under Section 7212(a) may enable the prosecutor to satisfy the agents' internal political goals (and thereby ensure the agents' availability to work on the next investigation), this is hardly a valid or just use of the power to charge citizens with criminal offenses. *See, e.g.*, *United States v. Rubin/Chambers, Dunhill Ins. Servs., Inc.*, 09-cr-1058 (S.D.N.Y.) (charging individual defendants under § 7212(a) in addition to antitrust and wire fraud statutes in case

Thus, in the instant case, the IRS initially audited and investigated Marinello and his business based on "an anonymous letter purporting to outline some of Marinello's business practices and accusing him of tax evasion." *United States v. Marinello*, 839 F.3d 209, 212 (2d Cir. 2016). The investigating agent likely believed that she would find either that Marinello had willfully evaded his tax obligations or, at a minimum, had intentionally underreported his income. As the opinion below recounts, however, the IRS was never able to "determine whether the unreported income was significant" – in other words, whether a felony charge was viable. *Id.* Marinello subsequently became aware of the IRS investigation and, in an interview with the same agent, admitted failing to file returns, destroying records, and having sloppy bookkeeping practices. *Id.*

There was no suggestion that Marinello engaged in obstructive conduct after becoming aware of the IRS's investigation. Nonetheless, by invoking the Omnibus Clause, the government was able to bring a felony charge that otherwise would have been untenable. From the perspective of the investigating agents and the prosecutorial team, this result was undoubtedly more desirable and successful than a mere misdemeanor resolution would have been. From the perspective of Marinello and similarly-

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centering on scheme to manipulate market for municipal bond investments); *United States v. O'Hara*, 10-cr-228 (S.D.N.Y.) (charging employees of Bernard L. Madoff Investment Securities LLC with violation of § 7212(a) in addition to violations of securities fraud statutes).

situated taxpayers, there is no predictability to a process where an individual may successfully defend against a multi-year government investigation into whether he had willfully evaded his tax obligations or filed materially false returns, only subsequently to learn of the government's intention to redirect its focus onto charging an inherently vaguer, less-focused offense.

Similar unfairness can result when Section 7212(a) is used to pile onto weak or deficient cases against defendants charged with crimes involving third parties' tax returns. *Amicus*'s members have defended such cases in recent years in the Southern District of New York, where for over a decade the government aggressively pursued criminal charges related to tax shelters designed and promoted by some of the country's largest and most prestigious law and accounting firms – only to have many of the cases reversed on appeal or dismissed by the district court.[7] As relevant here, in one multi-defendant case involving tax shelters marketed by the law firm Jenkins & Gilchrist, the government charged two defendants with having violated Section 7212(a) even though neither was in any way involved with IRS audits related to the tax shelters. While these defendants – a broker who executed securities transactions for tax shelter clients at the direction of the lawyers who designed the shelters, and an accounting firm CEO who was uninvolved in the

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[7] *See, e.g., United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012); *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

firm's work for tax shelter clients – were ultimately vindicated, each was forced to endure years of investigations, trials and other proceedings, and unwarranted and largely irreparable reputational damage. *See United States v. Parse*, 09-cr-581 (S.D.N.Y.); *United States v. Field*, 09-cr-581 (S.D.N.Y.). As these cases illustrate, the potential for prosecutorial abuse from an overbroad reading of the Omnibus Clause also risks exposing financial professionals to felony tax prosecutions even if they engage in no obstructive conduct and are otherwise innocent of tax crimes.

3. The Second Circuit's Approach Enables the Government to Circumvent an Expired Statute of Limitations by Charging Disparate Acts Together as a Scheme

Lastly, the Second Circuit's expansive reading of the Omnibus Clause allows the government to impose felony liability on taxpayers where the statute of limitations would otherwise bar prosecution. For instance, assume a hypothetical taxpayer who regularly destroyed records for reasons having nothing to do with the IRS. If this taxpayer had filed inaccurate returns through 2009, but thereafter had filed accurate and timely returns, by 2015 any charges under Section 7201 or 7206 would be time-barred. The government could nonetheless still threaten to bring charges under Section 7212(a) even though the taxpayer had engaged only in legal conduct during the statutory period – albeit conduct that, by its nature, may have complicated the IRS's job of auditing the taxpayer's non-time-barred

returns – thereby undermining the repose to which the taxpayer is statutorily entitled.

The Omnibus Clause also could be used to charge in a single count both time-barred felony conduct and more recent conduct that the government otherwise would not (or could not) charge as a felony. Take for instance a taxpayer who, for many years, failed to file accurate Schedules E reflecting income and expenses associated with rental real estate properties. If the real estate business operated at a material profit only in time-barred years, but had operated at a loss during the open years, the government would be unable to charge the taxpayer under Section 7201, and would be unlikely to charge a violation of Section 7206(1) since the recent losses that would have been reflected on accurate Schedules E would not have resulted in any unreported income on the taxpayer's Forms 1040 or incremental tax due and owing.[8] By using Section 7212(a), however, the government could allege that the entire pattern of conduct was part of the scheme to obstruct the enforcement of Title 26, thereby circumventing the statute of limitations problem that would otherwise exist.

Similarly, in a recently indicted case, *United States v. Levine*, 16-cr-715 (S.D.N.Y.), the government dodged a valid statute of limitations defense to tax

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[8] While filing a false Schedule E can constitute a violation of Section 7206(1), in the experience of *amicus*, the government rarely, if ever, brings charges under Section 7206(1) in the absence of some unreported income.

evasion conduct by alleging that it was part of a scheme to impede the IRS. In his pretrial motion to dismiss, Levine contended that the mere fact that he allegedly evaded taxes in multiple consecutive years – some time-barred, others not – was not itself indicative of a scheme to impede the IRS, as there was no unifying mechanism upon which the various evasions depended (such as a tax shelter, or a related fraud). Nor did one year's false filing depend upon, or benefit from, the next year's (nor vice versa). Rather, Levine argued, it simply happened to be the case that in each successive year, he allegedly evaded taxation. Levine also contended that other conduct charged as part of the 7212(a) scheme – conduct that fell within the statute of limitations, such as certain tax-credit transactions, or an alleged fraud on the defendant's employer – could not "possibly be found to support the [time-barred] scheme alleged," and that the government had improperly charged the conduct together only in order to overcome a limitations bar that otherwise could not be avoided. The District Court denied the motion, however, permitting the government to skirt this obstacle.[9]

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[9] The District Court denied Levine's motion for failing to accept as true the allegations in the Indictment, and thus seeking "to have the Court decide various disputes about the substantive merits" of the Section 7212(a) count at the motion to dismiss stage. Dkt. No. 29, Opinion & Order, at 7 (Apr. 12, 2017). Shortly thereafter, Levine changed his plea from not guilty to guilty; he currently awaits sentencing.

II. The Omnibus Clause's "Corruptly" Requirement Does Not Alleviate The Vagueness Concerns

Notwithstanding these serious issues of lack of fair notice and potential for prosecutorial abuse raised by its interpretation of Section 7212(a), the Second Circuit dismissed Marinello's vagueness argument because it was satisfied that the "corruptly" "*mens rea* requirement sufficiently restricts the omnibus clause's reach." 839 F.3d at 222 (internal quotations omitted). But as Judge Jacobs persuasively argued in his dissent from the denial of *en banc* rehearing, "*alleging* a corrupt motive is no burden at all." 855 F.3d at 457.

This is true whether or not the defendant happens to be guilty of a tax misdemeanor. It is much easier for the government to prove a "corrupt" intent than the "willfulness" it must prove for other tax offenses. Under Title 26, misdemeanor and felony liability generally require willfulness, the highest level of scienter.[10] The "standard for th[is] statutory willfulness requirement is the voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192, 201 (1991) (internal quotation marks omitted). This requires proof "that the law imposed a duty on the defendant, that [he] knew of

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[10] The sole inapposite exception is 26 U.S.C. § 7215, which imposes liability for continued failure to collect and pay over withholding tax after receipt of hand-delivered notification of failure to do so and does not require willfulness.

this duty, and that he voluntarily and intentionally violated that duty." *Id.*[11]

Accordingly, as Petitioner explains, if there is sufficient proof to charge a misdemeanor failure to file under Section 7203, then the government will already have undertaken the burden of establishing that the defendant acted "willfully"—*i.e.*, that he knew but deliberately disregarded his legal duty to file a return, pay the tax, keep required records, or provide information. In such a case, requiring the government to establish that the defendant acted "corruptly" will impose no additional *mens rea* burden. *See* Petr.Br.42-43, 52-53.

And, if the defendant has not committed any tax misdemeanor, "corruptly" provides a fairly toothless limitation on the scope of the Omnibus Clause. Indeed, it is not much of a "*mens rea* requirement" at all. Every circuit to have addressed the question has defined acting "corruptly" under Section 7212(a) as acting with intent to gain an unlawful advantage or benefit either for oneself or for another. *See United States v. Floyd*, 740 F.3d 22, 31 (1st Cir. 2014); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997); *Reeves*, 752 F.2d at 1001; *Miner*, 774 F.3d at 343; *United States v. Nelson*, 676 F. App'x 614, 616 (8th Cir. 2017); *United States v. Workinger*, 90 F.3d 1409, 1414 (9th Cir. 1996); *United States v. Winchell*, 129 F.3d 1093, 1098 (10th Cir.

[11] Non-willful violations of the provisions of the tax code generally subject taxpayers only to civil, not criminal, liability.

1997); *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991).

This language does not expressly require the defendant even to *know* that the benefit he sought was unlawful, and most circuits have imposed no such knowledge requirement.[12] The Department of Justice's own guidance also omits knowledge of unlawfulness from its burden of proof. The proposed jury instructions on Section 7212 set out in the Department of Justice's Criminal Tax Manual define "corruptly" merely as "act[ing] with the intent to secure an unlawful advantage or benefit." *See* U.S. Dep't of Justice Tax Div., Crim. Tax Manual, Gov't Proposed Jury Instr. No. 26.7212(a)-6, *available at* www.justice.gov/sites/default/files/tax/legacy/2013/02/26/CTM%20JI%20-%20Title%2026.pdf.

Consequently, as a practical matter the purported limitation of requiring "corrupt" intent is not a meaningful circumscription. Rather, it appears to be satisfied whenever the defendant intended to gain an advantage for himself or someone else – so long as that benefit happens to be unlawful,

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[12] A few circuits using this formulation have said that the defendant must act "with the specific intent to secure an unlawful benefit." *United States v. Jaensch*, 552 F. App'x 206, 210 (4th Cir. 2013); *accord United States v. Dean*, 487 F.3d 840, 853 (11th Cir. 2007); *United States v. Saldana*, 427 F.3d 298, 303 (5th Cir. 2005); *cf. Kelly*, 147 F.3d at 176-77 (declining to read willfulness requirement into § 7212(a) since jury instruction containing standard definition of "corruptly" "was as comprehensive and accurate as if the word 'willfully' was incorporated in the statute"). But most have not imposed any such limitation.

irrespective of whether the defendant knew that or not.

For instance, suppose a taxpayer participates in a tax shelter that he believes is a legitimate way to take advantage of a loophole in the tax code. The taxpayer does not violate any disclosure requirements, but the tax shelter involves a series of complex financial transactions that make it hard for the IRS to detect or investigate the details. Under the prevailing interpretation of "corruptly," if the government persuaded a jury that the tax shelter did not comply with the Internal Revenue Code, then the taxpayer could be convicted of violating the Omnibus Clause. Yet because the taxpayer in this hypothetical had an objectively reasonable belief of the shelter's legality, he did not engage in tax evasion or tax fraud. In this scenario, the Omnibus Clause would create criminal exposure for entirely innocent conduct.

Indeed, even legal acts or omissions violate Section 7212(a) if performed with the intent to obtain an unlawful benefit, *see, e.g.*, *Wilson*, 118 F.3d at 234, and this benefit need not be tax-related, *see, e.g.*, *Saldana*, 427 F.3d at 305. Moreover, under Section 7212(a), "obstructing" or "impeding" could include almost anything. *See United States v. Sorenson*, 801 F.3d 1217, 1229 (10th Cir. 2015) (upholding jury instruction that "[t]o 'obstruct or impede' is to hinder or prevent from progress; to slow or stop progress; or to make accomplishment difficult and slow"). And the Omnibus Clause covers not only actual obstruction or impediment of the due administration of the Internal Revenue laws, but also "endeavoring" to do so, which

the courts similarly have defined extremely broadly. *See United States v. Johnson*, 571 F. App'x 205, 209 (4th Cir. 2014) (jury instructed that "[a]n endeavor is any effort or any act or attempt to effectuate an arrangement or to try to do something, the natural and probable consequences of which is to obstruct or impede the due administration of the Internal Revenue laws"); *United States v. Dowell*, 430 F.3d 1100, 1110 (10th Cir. 2005) (jury instructed that "[t]he endeavor need not be successful, but it must at least have had a reasonable tendency to obstruct or impede the due administration of the Internal Revenue laws"). In the Second Circuit's view, "endeavor" even extends to an omission or failure to act. *See Marinello*, 839 F.3d at 224-25.

* * *

There is no meaningful limitation on the Omnibus Clause's scope if, as the Second Circuit concluded, the Clause covers conduct that simply makes the IRS's job harder, irrespective of whether that conduct was intended to obstruct a proceeding pending before the IRS. The potential for prosecutorial abuse of the Omnibus Clause is not limited to the threat of conviction, but extends to the threat of abusive investigation and charging decisions, which are particularly acute in this context, as explained above. The Second Circuit's decision invites prosecutors to abuse their power and risks exactly the discriminatory enforcement that the vagueness doctrine is designed to prevent, "raising the specter of potentially charging everybody . . . and seeing what sticks and who flips." *Ocasio v. United*

States, 136 S. Ct. 1423, 1445 (2016) (Sotomayor, J., dissenting). As Judge Jacobs aptly observed in his dissent from the denial of rehearing *en banc*: "How easy it is under the [Second Circuit's interpretation] for an overzealous or partisan prosecutor to investigate, to threaten, to force into pleading, or perhaps (with luck) to convict *anybody*." 855 F.3d at 457.

At best for the government, the Omnibus Clause is a provision "that can linguistically be interpreted to be either a meat axe or a scalpel." *United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999). In keeping with principles of due process and lenity, it "should reasonably be taken to be the latter," *id.*, and thus limited in scope to corrupt endeavors to obstruct a pending IRS proceeding.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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September 8, 2017